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Criminal Law — Durham Sanity Test Rejected. *State v. Lucas,* ..... *N.J.* ....., *152 A. 2d 50 (N.J., 1959).* Adhering to the traditional M'Naghten Rule, the New Jersey Supreme Court affirmed the conviction of defendant arsonist who set fire to a church rectory causing death of its three occupants. After conflicting testimony by four prominent psychiatrists, the defendant's requested jury instructions framed similar to the Durham test of legal insanity were denied. On appeal the Court upheld this denial, clearly stating it did not feel bound by precedent but "[U]ntil such time as we are convinced by firm foundation in scientific fact that a test . . . other than M'Naghten will serve the basic end of our jurisprudence . . . we shall adhere to it. . . ." (68).

Thus the Durham "product" test, first developed in *Durham v. U. S.*, 214 F. 2d 862, 45 A.L.R. 2d 430 (1954) and recently rephrased in *Carter v. U. S.*, 252 F. 2d 608 (D.C. Cir., 1957), which gained some ground by its statutory adoption in the Virgin Islands in 1957 (V.I. Code, Title 14, Section 14, 1957), suffered a setback at the hands of the New Jersey Court.

The instant case in citing *Bryant v. State,* 207 Md. 565, 115 A. 2d 502 (1955) recognizes that Maryland has also emphatically stated, "[W]e will not change the right and wrong test unless we are convinced that it is not the proper test.". Although most courts remain unconvinced, prominent jurists such as Cardozo, Frankfurter, Sobeloff and Thomsen (*supra,* p. 271) have recommended the abandonment of the M'Naghten test. See 15 Md. L. Rev. 93, 15 Md. L. Rev. 44.

Evidence — Credibility Of Dope Addict's Testimony Not A Proper Subject For An Expert Witness. *People v. Williams,* ..... *N.Y.* ....., *159 N.E. 2d 549 (1959).* Defendant dope peddler was convicted primarily as a result of the testimony of a dope addict. On lower court's refusal to allow defendant to show by an expert witness the effect of narcotic addiction upon the veracity of addicts, defendant appealed. The New York Court of Appeals *held* that until it is clearly and convincingly demonstrated to the full satisfaction of the Court that there is a consensus of scientific and medical opinion to the effect that narcotic

addicts of the same type as the witness in this case are unworthy of belief and are pathological liars, the Court will not allow individual experts to give their opinion on veracity or credibility of such persons as a class, emphasizing that to permit this was to raise a "collateral" issue with insufficient basis in scientific knowledge to permit it. Two dissenting Justices felt that "anything" having a tendency to show the accuracy, truthfulness and sincerity of a witness should be accepted in evidence. They quickly disposed of the "collateral issue" and "scientific consensus" arguments of the majority, answering the first by necessity; the second by citing *State v. Fong Loon,* 29 Ida. 248, 158 P. 233 (1916), an extreme case in this area. Therein the Court admitted expert testimony that flatly labeled dope addicts as pathological liars living in an unreal dream state. Also, in the State of Washington, it has been held that the defense is entitled to prove by expert testimony the effect of the drug upon the mind and memory of the user, *State v. Smith,* 103 Wash. 267, 174 P. 9 (1918), and further that "the habitual use of opium . . . is known to utterly deprave the victim of its use, and render him unworthy of belief.", *State v. Concannon,* 25 Wash. 327, 65 P. 534, 537 (1901).

A number of states have followed, to some extent, the *Fong Loon* theory: *State v. Smith, supra, Beland v. State,* 86 Tex. Cr. 285, 217 S.W. 147 (1920), *Effinger v. Effinger,* 48 Nev. 205, 239 P. 801 (1925), *State v. Prentice,* 192 Ia. 207, 183 N.W. 411 (1921). See also 3 WIGMORE ON EVIDENCE, (3rd Ed., 1940) Sec. 934; Rossman, *Testimony of a Drug Addict,* 58 Amer. L. Rev. 196 (1924); and Comment, Hale, *Evidence — Witnesses — Narcotics as Affecting Credibility,* 16 S. Cal. L. Rev. 333 (1942).

The Maryland Courts have not had occasion to deal with this specific problem but when dealing with expert testimony, in general, they have adopted a cautious attitude, admitting such evidence only when necessary and when it is likely to be of definite value. *Wimpling v. State,* 171 Md. 362, 189 A. 248 (1936), *Wilson v. State,* 181 Md. 1, 26 A. 2d 770 (1942), *Casualty Ins. Co. v. Messenger,* 181 Md. 295, 29 A. 2d 653 (1942).

Libel And Slander — Broadcaster Immune From Liability For Libelous Statements Made By A Political Candidate. *Farmers Educational and Cooperative Union v. W.D.A.Y. Inc.,* ..... *U.S.* ....., *79 S. Ct. 1302 (1959).* The petitioner cooperative union brought suit against the respon-

dent television station for concededly libelous statements made by a political candidate over the facilities of the respondent. The United States Supreme Court, by Mr. Justice Black, in affirming the North Dakota Supreme Court, *held* that the Communications Act of 1934, Sec. 315(a), as amended, 47 U.S.C.A. (1952) Sec. 315(a), which compels broadcasters to afford legally qualified political candidates equal time to that granted to other candidates for the same office, and prohibits any previous censorship of the broadcast, carries with it a federal immunity for the broadcast station from liability for libelous statements so broadcast. Mr. Justice Frankfurter, joined in dissent by Justices Harlan, Whittaker, and Stewart, reasoned that state libel laws should not be supplanted by federal statute in absence of a clear mandate from the Congress, and that here there was no such mandate; for, while the original version of the bill in Congress which became Sec. 315(a) contained an immunity clause, the final version did not.

Despite this sharp division of the Supreme Court in its initial construction of Sec. 315(a) in this precise situation, the decision relieves broadcasters of a dilemma caused by previous state and Federal Communications Commission decisions. *Sorensen v. Wood*, 123 Neb. 348, 234 N.W. 82, 82 A.L.R. 1098 (1932), had held that a broadcaster may be held liable for defamation, and therefore is only prohibited from censoring statements for their "political and partisan trend". *In Re Port Huron Broadcasting Co.*, 12 F.C.C. 1069 (1948) held that the prohibition against censorship was absolute, including even libelous statements (and see federal cases collected in 79 S. Ct. Rep. 1304, n. 3), without any authoritative indication that the Act grants immunity. Thus, the broadcaster was caught in the awkward position of risking loss of his license under the *Port Huron* doctrine if he censored a candidate's material, or possible liability for defamation under the doctrine of the *Sorensen* case if he failed to censor. The instant case resolves the conflict by construing the censorship prohibition as being absolute but carrying with it by necessary implication an absolute immunity from liability for defamation. For divergent views on the North Dakota Court's decision below, see 37 Tex. L. Rev. 114 (1958) and 32 So. Cal. L. Rev. 71 (1958).

Since 1952, a Maryland Statute (MD. CODE 1957, Art. 75, Sec. 6) has provided an immunity for the broadcaster for statements of candidates for public office concerning any opponent for the same office, but assessing liability as to

statements concerning others (including punitive damages upon proof of malice on the part of the broadcaster). *Quaere:* To what extent is this Maryland Statute superseded, under doctrines of federal preemption, by the federal immunity established by the instant construction of the Communications Act (See the instant case, 79 S. Ct. 1308, n. 19, dis. op., pp. 1312, n. 6, 1313, 1314)?

Municipal Corporations — Liability Of Municipality For Appointing Incompetent Agent. *McAndrew v. Mularchuk,* ..... *N.J.*....., *152 A. 2d 372 (1959).* Defendant, a "reserve" policeman employed by defendant municipality, was specially assigned to patrol an area at the request of a night club proprietor. Defendant was to be paid by the proprietor for such duty. Plaintiff was involved in an altercation that had erupted near the club and was shot in the back by defendant during an ensuing chase. Plaintiff recovered against the policeman, but his claim against the municipality was dismissed and he appealed.

The Superior Court of New Jersey, Appellate Division, would not grant relief on the theory of *respondeat superior* since there was no evidence that defendant municipality participated directly in the act of shooting. The Court held, however, in reversing and remanding the case, that the jury could have found that the Chief of Police whose act, on account of his position, might be regarded as the act of the municipality, was negligent in appointing and assigning defendant to police duties, armed with a revolver, in view of defendant's inadequate training and ability, and that such negligence was a proximate cause of plaintiff's wound, and rendered the municipality liable.

Although Maryland has never had occasion to consider this theory, the Court of Appeals has repeatedly ruled that one cannot recover from a municipal corporation for injuries sustained as a result of its negligence or nonfeasance in the exercise of governmental, as opposed to private or proprietary, functions, *Wynkoop v. Hagerstown,* 159 Md. 194, 150 A. 447 (1930), *Baltimore v. Eagers,* 167 Md. 128, 173 A. 56 (1934), *Baltimore v. State,* 173 Md. 267, 195 A. 571 (1937). In *Wynkoop v. Hagerstown,* the Court stated that police officers, exercising directly the police power of the state, are governmental agents, not municipal agents or servants, and the municipalities will not be responsible for their acts or omissions as police officers. See 3 Md. L. Rev. 159, 164 (1939). The New Jersey Court would permit the municipal corporation to be held liable even

though the reserve policeman was operating in a governmental capacity if someone sufficiently high in the municipal authority participates in the tort; and, here, the police chief, in allowing the defendant to act as a reserve policeman, was such a participant. *Cf. Johnson v. City of Jackson,* ..... Tenn. ....., 250 S.W. 2d 1, 3 (1952) *contra* to the New Jersey case.

In the State of New York, where immunity has been waived (Court of Claims Act, Sec. 8, L. 1939, Ch. 860), it was held that a city could be liable where the Police Commissioner was negligent in allowing an incompetent policeman to remain on the force, policeman having shot the plaintiff, *McCrink v. City of New York,* 296 N.Y. 99, 71 N.E. 2d 419 (1947). See also *Peters v. Bellinger,* ..... Ill. A. 2d ....., 159 N.E. 2d 528 (1959); MCQUILLIN, MUNICIPAL CORPORATIONS (3d Ed. 1950), Vol. 18, Secs. 53.78-53.80; III DAVIS, ADMINISTRATIVE LAW (12th Ed. 1958), Secs. 25.07, 25.17.

Taxation — Continued Receipt Of Rents By Grantor Subjects Transferred Realty To Estate Tax. *McNichol's Estate v. Commissioner of Internal Revenue, 265 F. 2d 667 (C.C.A. 3d 1959).* Decedent gratuitously conveyed certain income producing real estate to his children nine years before his death in 1951. Pursuant to an oral understanding with the grantees, decedent continued to receive the rents from these properties until his death, although the deeds did not state that any income or interest in the land had been reserved by him. In his federal income tax returns, decedent reported the rents as his personal income. The Tax Court held that the properties were includable in the decedent's gross estate under sec. 811 (c), (1), (B) of the Internal Revenue Code of 1939, which provided that property which has been transferred *inter vivos* is includable in the gross estate of a decedent when he had retained for his life the possession or enjoyment of, or the right to, the income from the property. In affirming, the Court held that the reservation need not be explicitly expressed in the deeds in order for the grantor to "enjoy" the income from the property, nor need the decedent have reserved an enforceable claim in order to retain the "right to the income". Consequently, the state statute of frauds, prohibiting the enforcement of certain oral agreements, was inapplicable. The Court concluded, despite petitioners' technical contentions, that the decedent in fact enjoyed the income from the conveyed property until his

death, and that petitioners could not avoid the estate tax since the ultimate possession and enjoyment of the property was not effected until the death of the grantor.

The regulations under the comparable section of the 1954 Code, Reg. 20.2036-1(a), are in accord, indicating that a mere understanding, express or implied, at the time of transfer, that the life interest would be later conferred on the grantor, is to be treated as a "retention" of the interest by the grantor.

Taxation — Maryland Ground Rents Not Taxable As Realized Income On Sale Of Leasehold. *Welsh Homes, Inc. v. Commissioner, 32 T.C. #22 (1959).* Taxpayer, a real estate developer, bought land in fee simple, erected houses thereon, and created ground rents which he retained upon sale of the houses and transfer of the leaseholds. The Commissioner contended that the reserved ground rent was to be treated as a mortgage, and that the capitalized value, like a mortgage, should be included in determining gain or loss on the sale. Re-examining and following *Commissioner v. Simmers Estate,* 231 F. 2d 909 (4th C.C.A.), noted in 17 Md. L. Rev. 241 (1957), the Tax Court held that under the peculiar Maryland ground rent system, no taxable event occurs until the developer disposes of the ground rent, or the purchaser redeems it. The court also rejected the Commissioner's alternative argument that the full amount received by the taxpayer, less depreciation, was includable in the taxpayer's income as rent, without a deduction for construction costs. (See "No Gain or Loss on Maryland Ground Rent not Sold with House", 59 CCH Standard Fed. Tax Rep., ¶ 8725).

Wills — Construction Of "No-Contest" Clause. *Kolb v. Levy, ... Fla. ....., 110 S. 2d 25 (1959).* Plaintiff, legatee under a will which stated that a beneficiary who contested or aided in contesting any portion of the will would forfeit the bequest provided for him, filed a complaint for declaratory relief alleging that decedent breached a contract to make a will in the former's favor. Defendants argued that the plaintiff forfeited any rights under the will because her attempted enforcement of the alleged contract amounted to a "contest" of the will. In holding for the plaintiff, the District Court of Appeal of Florida (3rd Dist.) stated that "no-contest" clauses, the violation of which results in forfeiture should be strictly construed. Here there was no evidence that plaintiff attempted to

prosecute her claim in bad faith or without reasonable cause; her actions did not amount to a "contest".

In *Black v. Herring,* 79 Md. 146, 28 A. 1063 (1894), the only related Maryland case dealing with such clauses, the Court of Appeals reasoned that plaintiff did not thwart the desire of the testatrix or forfeit his right to benefit from the will by filing a bill in Equity seeking a true construction of the will. See: annotations in 5 A.L.R. 1370, and 49 A.L.R. 2d 205; ROLLISON, WILLS (1939), 377-383; THOMPSON, WILLS (3d Ed. 1947) 573-5.